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Labor Law -- Unfair Labor Practices -- Employer By-passing Designated Bargaining Agent

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when compelled to speak[37] and the voice heard at the time the rape was committed should not be excluded as a violation of the privilege against self incrimination. It should be admitted as a fact calculated to aid the jury in discovering the truth, the correctness of the identification going to the weight and not the admissibility of the evidence.[38]

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Labor Law—Unfair Labor Practices—Employer By-passing Designated Bargaining Agent

An employer, after having bargained to an impasse with the certified representative of the employees, submitted his final proposal directly to strikers individually by mail, requesting them to vote on a ballot provided as to whether they would be willing to return to work upon the terms proposed by the employer but rejected by the union. The National Labor Relations Board found[1] that the employer interfered with the rights of the employees to bargain collectively within the meaning of Section 8(a)(1)[2] of the National Labor Relations Act. Upon petition to the Circuit Court of Appeals for the Seventh Circuit for enforcement of the order, it was held that the evidence did not justify a finding of an unfair labor practice because: (1) the letter disclosed no effort to bargain with the employees individually; (2) the employer had evidenced his good faith in dealing with the union; and (3) the employer

[37] No power of compulsion beyond that ordinarily permitted in obtaining testimony should be allowed. The powers of compelling testimony are discussed in 8 WIGMORE, EVIDENCE §2195 (3d ed. 1940). If the accused refuses to repeat the words, testimony as to this refusal would be competent. State v. Graham, 74 N. C. 646 (1876).

[38] The question of admissibility of voice identification on grounds other than violation of the privilege against self-incrimination is beyond the scope of this note. Proper safeguards should be taken to prevent inducement or suggestion of the identification. The accused should be presented in company with others who are similar in appearance. This procedure was followed in the instant case. 3 WIGMORE, EVIDENCE §§786, 786a (1946). In general such identification is admissible, its probative value to be a question for the jury. Riner v. State, 128 Fla. 848, 176 So. 38 (1937); Fussell v. State, 93 Ga. 450, 21 S. E. 97 (1895); Commonwealth v. Williams, 105 Mass. 67 (1870); 2 WIGMORE, EVIDENCE §660 (3d ed. 1940); STANSBURY, NORTH CAROLINA EVIDENCE, §96 (1946).

[1] Penokee Veneer Co., 74 N. L. R. B. 1683 (1947).

[2] 49 STAT. 452 (1935), 29 U. S. C. §158(1) (1946), as amended by National Labor Management Relations Act, 61 STAT. ——, 29 U. S. C. §158(a)(1) (Supp. 1947): "It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7." Sec. 7 provides, "Employees shall have the right to self organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3)."

had never been charged with failure to bargain collectively nor any previous unfair conduct.[3]

Section 1[4] of the Act provides that it is the policy of the United States to remove recognized sources of industrial strife by establishing equality of bargaining power and encouraging collective bargaining between employers and employees. Fundamental to the whole structure of collective bargaining are the exclusive bargaining rights[5] granted to the proper representative of the employees. The duty of the employer to bargain collectively with the union designated by the employees includes the negative duty to refrain from bargaining with any other group or individual.[6]

Fact situations of a wide variety have arisen before the National Labor Relations Board which present the question of whether or not it is an unfair labor practice for the employer to disregard or by-pass the union designated by the employees as their bargaining representative. The Board has consistently held that it is an unfair labor practice for an employer to by-pass the designated representative of the employees by dealing directly with them individually[7] or by unilaterally determining conditions of employment.[8] Similarly, unfair labor prac-

[3] National Labor Relations Board v. Penokee Veneer Co., 168 F. 2d 868 (C. C. A. 7th 1948).

[4] 49 STAT. 449 (1935), 29 U. S. C. §151 (1946), as amended, 61 STAT. ——, 29 U. S. C. §151 (Supp. 1947).

[5] National Labor Relations Act, 49 STAT. 453 (1935), 29 U. S. C. §158(5) (1946), as amended, 61 STAT. ——, 29 U. S. C. §158(a)(5) (Supp. 1947): "It shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a)." Sec. 9(a) provides, "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. . . ." See generally: Weyand, *Majority Rule in Collective Bargaining,* 45 COL. L. REV. 556 (1945).

[6] Medo Photo Supply Corp. v. National Labor Relations Board, 321 U. S. 678, 683-684 (1943); National Labor Relations Board v. Jones & Laughlin Corp., 301 U. S. 1, 44 (1936); 2 TELLER, LABOR DISPUTES AND COLLECTIVE BARGAINING 328 (1940).

[7] *See, e.g.,* Craddock-Terry Shoe Corp., 73 N. L. R. B. 1339 (1947); Twin City Milk Producers Ass'n, 61 N. L. R. B. 69 (1945); Arundel Corp., 59 N. L. R. B. 505 (1944); Burke Machine Tool Co., 36 N. L. R. B. 1329 (1941), *enforcement granted (minor modifications),* 133 F. 2d 618 (C. C. A. 6th 1942); Highland Shoe, Inc., 23 N. L. R. B. 259 (1940), *enforcement granted,* 119 F. 2d 218 (C. C. A. 1st 1941); Pacific Gas Radiator Co., 21 N. L. R. B. 630 (1940); Stout, Charles Banks, 15 N. L. R. B. 541 (1939); Reed & Prince Mfg. Co., 12 N. L. R. B. 944 (1939), *enforcement granted (minor modifications),* 118 F. 2d 874 (C. C. A. 1st 1941); Williams Coal Co., 11 N. L. R. B. 579 (1939); Hopwood Retinning Co., 4 N. L. R. B. 922 (1938), *enforcement granted (as modified),* 98 F. 2d 97 (C. C. A. 2d 1938); Biles-Coleman Lumber Co., 4 N. L. R. B. 679 (1937), *enforcement granted,* 98 F. 2d 18 (C. C. A. 9th 1938); 4 NLRB ANN. REP. 137 (1939).

[8] *See, e.g.,* Hartz Stores, 71 N. L. R. B. 848 (1946): May Dep't. Stores Co., 53 N. L. R. B. 1366 (1943), *enforcement granted,* 146 F. 2d 66 (C. C. A. 8th 1944), *aff'd,* 326 U. S. 376 (1945); Hirsch Mercantile Co., 45 N. L. R. B. 377

tices have been found when an employer urges striking employees to return to work under the employer's terms regardless of the decision of their chosen bargaining representative,[9] or when an employer conducts a poll among the employees to determine their wishes about returning to work.[10]

A review of the cases in the circuit courts of appeals reveals a divergence of opinion. The Seventh Circuit Court of Appeals set aside the Board's finding of an unfair labor practice where the employer conducted his own strike vote subsequent to a strike resolution of the union,[11] but approved a finding of an unfair labor practice when an employer went over the head of the union and submitted an employment contract to a mass meeting of employees.[12] In *National Labor Relations Board v. Remington Rand*[13] the Second Circuit Court of Appeals upheld a finding of an unfair labor practice where an employer conducted a strike vote of his own, disregarding the strike vote conducted by the union. The Board's finding of an unfair labor practice was rejected by the Sixth Circuit Court of Appeals where the employer had polled the employees, rather than bargain with their representative, with reference to holiday and overtime work.[14] The Fifth Circuit Court of Appeals conceded that it was unfair for an employer to effect a wage cut unilaterally[15] but reached an opposite result when the employer unilaterally increased wages.[16]

(1942); Wilcox Oil & Gas Co., 28 N. L. R. B. 79 (1940); Southern Cotton Oil Co., 26 N .L. R. B. 177 (1940); Brown Shoe Co., 1 N. L. R. B. 803 (1936). *But cf.* May Dep't. Stores Co., 53 N. L. R. B. 976 (1943).

[9] *See, e.g.*, National Container Corp., 57 N. L. R. B. 565 (1944); Chicago Molded Products Corp., 38 N. L. R. B. 1111 (1942); Montgomery Ward & Co., 37 N. L. R. B. 100 (1941), *enforcement granted*, 133 F. 2d 676 (C. C. A. 9th 1942); Martin Bros. Box Co., 35 N. L. R. B. 217 (1941), *enforcement granted*, 130 F. 2d 202 (C. C. A. 7th 1942), *cert. denied*, 317 U. S. 660 (1942); Atlas Mills, 3 N. L. R. B. 10 (1937). *But cf.* Gulf States Utilities Co., 42 N. L. R. B. 988 (1942).

[10] Mt. Clemens Pottery Co., 46 N. L. R. B. 714 (1943), *enforcement granted (as modified)*, 147 F. 2d 262 (C. C. A. 6th 1945); Biles-Coleman Lumber Co., 4 N. L. R. B. 679 (1937), *enforcement granted*, 98 F. 2d 18 (C. C. A. 9th 1938); accord, Algoma Plywood & Veneer Co., 26 N. L. R. B. 975 (1940), *enforcement denied*, 121 F. 2d 602 (C. C. A. 7th 1941). *But cf.* Fafnir Bearing Co., 73 N. L. R. B. 1008 (1947) (strike called in violation of contract).

[11] National Labor Relations Board v. Algoma Plywood & Veneer Co., 121 F. 2d 602 (C. C. A. 7th 1941) (strike resolution illegal).

[12] National Labor Relations Board v. Martin Bros. Box Co., 130 F. 2d 202 (C. C. A. 7th 1942), *cert. denied*, 317 U. S. 660 (1942); *accord*, National Labor Relations Board v. Montgomery Ward & Co., 133 F. 2d 676 (C. C. A. 9th 1943).

[13] 94 F. 2d 862 (C. C. A. 2d 1938), *cert. denied*, 304 U. S. 576, 585 (1938); *accord*, National Labor Relations Board v. New Era Die Co., 118 F. 2d 500 (C. C. A. 3d 1941).

[14] National Labor Relations Board v. Brown-Brockmeyer Co., 143 F. 2d 537 (C. C. A. 6th 1944).

[15] National Labor Relations Board v. Whittier Mills Co., 111 F. 2d 474 (C. C. A. 5th 1940); *accord*, Great Southern Trucking Co. v. National Labor Relations Board, 127 F. 2d 180 (C. C. A. 4th 1942); National Labor Relations Board v Pilling & Son Co., 119 F. 2d 32 (C. C. A. 3d 1941).

[16] National Labor Relations Board v. Crompton-Highland Mills, Inc., 167 F

The United States Supreme Court faced the question in two cases. In *Medo Photo Supply Corp. v. National Labor Relations Board,*[17] at the request of the employees, the employer negotiated with them and granted a wage increase without the intervention of the union. In *May Department Stores Co. v. National Labor Relations Board*[18] the employer unilaterally applied to the War Labor Board for approval of a wage increase. In both cases the Court held that the National Labor Relations Board was justified in finding unfair labor practices in spite of the extenuative circumstances that the *Medo* case employees in effect *requested* the employer to by-pass the union, and the *May* case employer's unilateral action consisted of a mere *preliminary step* toward a wage adjustment. Thus the Supreme Court has given strong support to the proposition that it is unfair for the employer to by-pass the designated employee representatives either by dealing with employees directly or by unilateral action.

The findings of unfair labor practices in these cases are not always based on the same provision of the Act. The conduct of the employer in by-passing the union has been treated as evidence of bad faith in bargaining and therefore a failure to bargain as required in Section 8(a)(5),[19] and an interference with the rights of the employees which are protected by the general terms of Section 8(a)(1).[20]

Though a violation of 8(a)(5) is technically a violation of 8(a)(1) also,[21] it is not necessary to find a violation of 8(a)(5) in order to find

2d 662 (C. C. A. 5th 1948), *cert. granted,* 69 Sup. Ct. 52 (1948). *Contra:* National Labor Relations Board v. May Dep't. Stores Co., 146 F. 2d 66 (C. C. A. 8th 1944), *aff'd,* 326 U. S. 376 (1945).

[17] 321 U. S. 678, 684-685 (1943) ("That it is a violation of the essential principle of collective bargaining and an infringement of the Act for the employer to disregard the bargaining representative by negotiating with individual employees . . . with respect to wages, hours and working conditions was recognized by this court. . . . The statute guarantees to all employees the right to bargain collectively through their chosen representative. Bargaining carried on by the employer directly with the employees . . . who have not revoked their designation of a bargaining agent, would be subversive of the mode of collective bargaining which the statute has ordained, as the Board, the expert body in this field, has found. Such conduct is therefore an interference with the rights guaranteed by §7 and a violation of §8(1) of the Act.").

[18] 326 U. S. 376, 384 (1945) (citing the *Medo* case, the Court said, "Employer action to bring about changes in wage scales without consultation and negotiation with the certified representative of its employees cannot, we think, logically or realistically, be distinguished from bargaining with individuals or minorities.").

[19] See note 5 *supra;* Great Southern Trucking Co. v. National Labor Relations Board, 127 F. 2d 180 (C. C. A. 4th 1942); National Labor Relations Board v. Pilling & Son Co., 119 F. 2d 32 (C. C. A. 3d 1941); Weyand, *supra* note 5, at 579-580.

[20] May Dep't. Stores Co. v. National Labor Relations Board, 326 U. S. 376 385 (1945); Medo Photo Supply Corp. v. National Labor Relations Board, 321 U. S. 678, 684 (1943) ("Such conduct is therefore an interference with the rights guaranteed by §7 and a violation of §8(1) of the Act."); National Labor Relations Board v. Whittier Mills Co., 111 F. 2d 474 (C. C. A. 5th 1940) (conduct may constitute failure to bargain, interference, or both).

[21] Arts Metal Construction Co. v. National Labor Relations Board, 110 F. 2d

a violation of 8(a)(1).[22] Thus it appears that by-passing the designated representative of the employees, if not a refusal to bargain, may constitute interference, though the possibility seems to be overlooked on occasion.[23]

The instant case is open to criticism on two principle grounds:[24]

1. The reasons given by the court to support its conclusion that the employer committed no unfair labor practice in conducting the poll among the employees may constitute a valid argument that the employer had not refused to bargain with the designated union within the meaning of §8(a)(5). However, the reasoning does not support a conclusion that the employer had not interfered with rights of the employees protected by §8(a)(1),[25] the only unfair labor practice charged against the employer in this case.

2. On the merits, it is difficult to conceive of any employer conduct which could more effectively interfere with the rights of the employees to bargain collectively through the representative of their own choosing. Though the mere act of conducting a poll among strikers to determine their wishes about returning to work may appear to be innocent on the surface, a consideration of the effect of such conduct brings out a different picture. By contacting each employee individually, the employer subjects them to the same pressures which the Act was intended to eliminate and "minimizes the influence of organized bargaining."[26] An

148 (C. C. A. 2d 1940); Note, 9 GEO. WASH. L. REV. 360, 362 ("The committee reports indicate that the unfair labor practices set forth in subsections (2), (3), (4), and (5) of section 8, are not intended to limit the guaranties of subsection (1) of that section, but are merely intended to set out with greater particularity some of the unfair labor practices requiring such amplification. SEN. REP. No. 573, 74th Cong. 1st Sess., at 9; H. R. REP. No. 1147, 74th Cong. 1st Sess., at 17."). *But cf.* National Labor Relations Board v. Express Publishing Co., 312 U. S. 426 (1941).

[22] Medo Photo Supply Corp. v. National Labor Relations Board, 321 U. S. 678, 684 (1943) (quoted *supra* note 20. By implication).

[23] It is believed that National Labor Relations Board v. Algoma Plywood & Veneer Co., 121 F. 2d 602 (C. C. A. 7th 1941) is in this category. See note 24 *infra*.

[24] The instant case is also to be criticized for drawing its own inferences from the evidence, in disregard of the well established rule that inferences are to be drawn by the Board and not the courts. National Labor Relations Board v. Pennsylvania Greyhound Lines, Inc., 303 U. S. 261 (1938). In 2 TELLER, LABOR DISPUTES AND COLLECTIVE BARGAINING §396 n. 50 (Supp. 1947) it is suggested that the Seventh Circuit Court of Appeals in particular continues to place itself in the position of the Board by "looking to the general picture disclosed by the facts upon which the Board predicated its decision and order, and passing on the petition . . . in the light of this general picture."

[25] The same error in reasoning was committed by the same court in National Labor Relations Board v. Algoma Plywood & Veneer Co., 121 F. 2d 602, 608 (C. C. A. 7th 1941), relied upon in the principal case. There the employer's conduct in holding his own strike vote was said to be a "proper and necessary business expedient." Assuming that this justifies a refusal or failure to bargain, does it necessarily follow that there has been no interference with the employees' right to bargain collectively through their representative?

[26] May Dep't. Stores Co. v. National Labor Relations Board, 326 U. S. 376, 385 (1945).

immediate consequence would be to discredit the union in the eyes of the employees by demonstrating that the union does not effectively represent them.[27] The ultimate consequence may be the complete destruction of the actual bargaining capacity of the representative.[28]

LIVINGSTON VERNON.

Libel—Theories of Liability—Publication as Single or Multiple Tort

At common law it was uniformly held that each time a libelous article was brought to the attention of a third person a new publication had occurred and each publication gave rise to a separate cause of action.[1] This is still the law in many jurisdictions[2] and is the view adopted by the *Restatement of Torts*,[3] but the weight of modern authority favors the "single publication" rule of liability.[4] This rule contemplates that, whereas each publication does give rise to a separate cause of action, in the case of newspapers, magazines and books there is but one publication which occurs at the place where the alleged libel is published[5] and is completed when the libelous matter has been composed, printed and generally distributed.[6]

[27] National Labor Relations Board v. Remington Rand, 94 F. 2d 862, 870 (C. C. A. 2d 1938).

[28] *Ibid.*

[1] ODGERS, LIBEL AND SLANDER 139 (6th ed. 1929); *see* Age-Herald Pub. Co. v. Huddleston, 207 Ala. 40, 43, 92 So. 193, 196 (1921).

[2] *E.g.*, Hartmann v. American News Co., 69 F. Supp. 736 (W. D. Wis. 1947); Holden v. American News Co., 52 F. Supp. 24 (E. D. Wash. 1943), *app. dismissed*, 144 F. 2d 249 (C. C. A. 9th 1944); Lockey v. Metropolitan Life Ins. Co., 26 Tenn. App. 564, 174 S. W. 2d 575 (1943); Underwood v. Smith, 93 Tenn. 687, 27 S. W. 1008 (1894); Renfro Drug Co. v. Lawson, 138 Tex. 434, 160 S. W. 2d 246 (1942); Duke of Brunswick v. Harmer, 14 Q. B. 185, 117 Eng. Rep. 75 (1849).

[3] RESTATEMENT, TORTS §578(b) (1938).

[4] Hartmann v. Time, Inc., 166 F. 2d 127 (C. C. A. 3d 1948); Polchlopek v. American News Co., 73 F. Supp. 309 (D. Mass. 1947); McGlue v. Weekly Publications, Inc., 63 F. Supp. 744 (D. Mass. 1946); Cannon v. Time, Inc., 39 F. Supp. 660 (S. D. N. Y. 1939); Backus v. Look, 39 F. Supp. 662 (S. D. N. Y. 1939); Means v. MacFadden Publications, 25 F. Supp. 993 (S. D. N. Y. 1939); Age-Herald Pub. Co. v. Huddleston, 207 Ala. 40, 92 So. 193 (1921); Winrod v. Time, Inc., 334 Ill. App. 59, 78 N. E. 2d 708 (1948); Forman v. Mississippi Publisher's Corp., 195 Miss. 90, 14 So. 2d 344 (1943); Gregoire v. G. P. Putnam's Sons, 298 N. Y. 119, 81 N. E. 2d 45 (1948), *reversing*, 272 App. Div. 591, 74 N. Y. S. 2d 238 (1st Dep't 1947); Wolfson v. Syracuse Newspapers, Inc., 254 App. Div. 211, 4 N. Y. S. 2d 640 (4th Dep't 1938), *aff'd*, 279 N. Y. 716, 18 N. E. 2d 676 (1939), *rearg. denied*, 280 N. Y. 572, 20 N. E. 2d 21 (1939); *see* Julian v. Kansas City Star Co., 209 Mo. 35, 71, 107 S. W. 496, 500 (1907); *cf.* Murray v. Galbraith, 86 Ark. 50, 109 S. W. 1011 (1908).

[5] *Contra:* Julian v. Kansas City Star Co., 209 Mo. 35, 107 S. W. 496 (1907). *Compare* Age-Herald Pub. Co. v. Huddleston, 207 Ala. 40, 92 So. 193 (1921) *with* Julian v. Kansas City Star Co., *supra*.

[6] General distribution to newsstands and subscribers is all that is required. The mailing out of miscellaneous copies to replace those lost or damaged, or in response to requests for the purchase of single copies is a part of the original publication and does not constitute a republication such as will amount to an additional tort